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While the Senate Sleeps: Do Contemporary Events Warrant a New Interpretation of the Recess Appointments Clause?

Blake Denton

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WHILE THE SENATE SLEEPS: DO CONTEMPORARY EVENTS WARRANT A NEW INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE?

Blake Denton⁺

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I. INTRODUCTION

Article II's Advice and Consent Clause provides a seemingly unqualified method for appointing federal officials: the president "shall nominate, and by and with the Advice and Consent of the Senate," appoint federal judges and other officers of the United States.¹ However, the very next clause, known as the Recess Appointments Clause ("the Clause"), quickly curtails this otherwise absolute mandate. It states that, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."² This contemplates no role for the Senate in approving temporary commissions that

⁺ Law Clerk to the Honorable Phyllis A. Kravitch, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit. B.A., Rutgers University; J.D., Brooklyn Law School. Special gratitude is owed to Professor Jason Mazzone for his time, revisions, and recommendations. Also, thanks to Monica Asher and Peter Plevritis for their critiques of drafts.

1. U.S. CONST. art. II, § 2, cl. 2. The only "judges" that the Advice and Consent Clause specifically references are "judges of the Supreme Court." *Id.* "Officers of the United States" has been read to include federal judges of inferior courts. See *infra* note 9. The appointment process "serves as one means by which the Framers 'textually committed the nation to checks and balances,' and—particularly in the case of judicial appointments—serves to protect individual rights and liberties through a constitutional structure that resists individual 'encroachments' and 'majoritarian impulses.'" Matthew Madden, Note, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1144 (2007) (quoting Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1082 (1988) (footnote omitted)).

2. U.S. CONST. art. II, § 2, cl. 3.

“happen during the Recess of the Senate.”³ On its face, the Recess Appointments Clause leaves all power and discretion solely in the hands of the president. The question becomes: how do we reconcile these two clauses? Does the Recess Appointments Clause always trump the Advice and Consent Clause? The problem is that the Recess Appointments Clause is broad and indefinite in scope. The lack of clarity and specificity explains why the Recess Appointments Clause has been described as “a single, vague text [that] applies in quite different settings.”⁴ The Clause’s vagueness and the often unsettling ramifications accompanying its use demonstrate that debates over the Clause cannot be settled by textual analysis alone. Instead, to find the proper interpretation of the Recess Appointments Clause, we may need to look beyond its text to the reasons that the Framers drafted it in the first place.⁵

The Recess Appointments Clause is somewhat of an anomaly. It was adopted by the Continental Congress without debate.⁶ Further, the Federalist Papers and other documents contemporaneous to the Constitution’s ratification fail to discuss the Clause in depth.⁷ Alexander Hamilton, in *Federalist* 67, does, however, provide two minor clues to the Recess Appointments Clause’s intended reach.⁸ First, he explains that the word “officers” was intended to refer to the positions described in the Advice and Consent Clause.⁹ Second, he lays out the purpose behind the Clause:

3. *Id.*; see also Jeannine R. Reardon, *Selecting Supreme Court Justices: Preserving the System, Protecting with Professionalism*, 40 SUFFOLK U. L. REV. 861, 870–71 (2007) (stating that the president may make an appointment without Senate approval if Congress is not in session).

4. Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 453 (2005).

5. In his article, Professor Herz points out that “[t]he inquiry changes from one about ‘purpose’ to one about ‘policy.’” *Id.* at 457.

6. Louis Fisher, *Recess Appointments of Federal Judges*, in THE SUPREME COURT AND THE FEDERAL JUDICIARY 125, 126 (Steven C. Caldwell ed., 2002) [hereinafter Fisher, *Recess Appointments*]; Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 552 (1996); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758, 1768 (1984) (“The clause was proposed late in the convention, on the same day that the delegates finally agreed to vest the general appointments power in the President with approval by the Senate. The clause passed without objection or recorded debate.” (footnote omitted)).

7. See *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) (Norris, J., dissenting); Herz, *supra* note 4, at 444 n.4.

8. The United States Supreme Court has noted that the Federalist Papers are “great authority” and provide a “complete commentary on our constitution.” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821).

9. Alexander Hamilton explains that the Recess Appointments Clause was not intended to apply to vacancies in the Senate. In doing so, he concludes that the word “officers” refers to those described in the preceding clause. THE FEDERALIST NO. 67, at 455 (Alexander Hamilton) (Jacob E. Cook ed., 1961) (“If this clause is to be considered as supplementary to the one which

The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of offices; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause [the Recess Appointments Clause] is evidently intended to authorise the President *singly* to make temporary appointments . . .¹⁰

Hamilton's analysis, by focusing on positions "which it might be necessary for the public service to fill without delay," emphasizes the notion of urgency, which was undoubtedly of concern to the Framers.¹¹ For example, if during wartime the Senate was in recess and the secretary of defense died, it would be "necessary for the public service" to fill this position without delay. In approving the Clause, the Framers recognized that this type of extreme situation would warrant circumventing the traditional advice and consent requirements in favor of expediency and national security.¹² Unfortunately, not all recess appointments have been such clear-cut cases.¹³ Because the Continental Congress and *Federalist Papers* do not provide further explanation as to the Framers' understanding of the Recess Appointments Clause, textual analysis of this provision has resulted in heated debate. The Clause has been the source of litigation, scholarly analysis, and congressional action.¹⁴

In particular, three main textual issues have arisen with regard to the Recess Appointments Clause. First, what counts as "the Recess of the Senate"?¹⁵ Some commentators conclude that "the Recess" only refers to the Senate's

precedes, the *vacancies* of which it speaks must be construed to relate to the 'officers' described in the preceding one; and this we have seen excludes from its description the members of the Senate."); see also Arthur Ago, Comment, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Administrative Procedure*, 65 GEO. WASH. L. REV. 544, 585 (1997).

10. THE FEDERALIST NO. 67 (Hamilton), *supra* note 9, at 455.

11. *Id.*; see Herz, *supra* note 4, at 445–46 (attacking articles that focus on when the vacancy arose by examining the purpose of the clause). Herz argues that "if the president needs to make an appointment, and the Senate is not around, *when* the vacancy arose hardly matters; the point is that it must be filled now." *Id.*

12. See 1 Op. Att'y Gen. 631, 633 (1823); Curtis, *supra* note 6, at 1768.

13. See, e.g., *Evans v. Stephens*, 387 F.3d 1220, 1221–27 (11th Cir. 2004) (involving the appointment of Judge Pryor to the Eleventh Circuit Court of Appeals). Judge Pryor had previously been nominated to the federal judiciary by President George W. Bush, but because of procedural maneuvering, the Senate never gave an up or down vote. See Michael A. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges*, WASH. POST, Dec. 24, 2004, at A5. A vacancy arose before a recess of the Senate and, nine days into the recess, the President used his recess appointment power to appoint Judge Pryor. *Evans*, 387 F.3d at 1221. See *infra* notes 166–70 and accompanying text for further discussion of *Evans*.

14. See *infra* notes 15–41, 166–93 and accompanying text.

15. See Fisher, *Recess Appointments*, *supra* note 6, at 127; Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 408 (2005).

intersession recess, which is the break between two sessions of the Senate.¹⁶ They argue that use of the word “the” implies a singular connotation.¹⁷ Thus, there can only be only one recess per session of the Senate.¹⁸ Others assert that if the Framers wanted to limit the scope of the Clause in such a manner, they would have expressly done so.¹⁹ They contend that “Recess” refers to both the intersession recess and intrasession recesses, which are adjournments made during a given session of the Senate.²⁰ They cling to the congressional definition of “Recess” as any break in session for longer than three days.²¹ This interpretation includes long weekends, such as holiday breaks for Memorial Day and Independence Day, in the definition of “Recess.”²² To date, this argument has prevailed. Many presidents, starting with Andrew Johnson, have made intrasession recess appointments,²³ and several courts have upheld decisions drafted by judges serving as intrasession recess appointees.²⁴

The second controversy involving the text of the Recess Appointments Clause relates to the meaning of “Vacancies that may happen during the Recess of the Senate.”²⁵ For example, if a cabinet official dies during a session of the Senate, but no one is confirmed before the Senate’s next recess, may the president use the recess appointment power to fill the vacancy? Some argue

16. See Michael A. Carrier, Note, *When Is the Senate in Recess for the Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2218–19 (1994).

17. See *Evans*, 387 F.3d at 1228 n.2 (Barkett, J., dissenting); 23 Op. Att’y Gen. 599, 600–01 (1901); Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61, 90–91 (2006).

18. Carrier, *supra* note 16, at 2218–19.

19. Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 NW. U. L. REV. COLLOQUY 82, 84–85 (2007), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2007/2/LRColl2007n2Tillman.pdf>.

20. Hartnett, *supra* note 15, at 424.

21. See Paul Kane, *Senate Stays in Session to Block Recess Appointments*, WASH. POST, Nov. 17, 2007, at A4 (“Congressional rules allow for the Senate to be adjourned for three full days without being considered in recess.”).

22. See *id.*

23. Carrier, *supra* note 16, at 2211; see also Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 670 tbl.1 (2004) (identifying “Recess Appointments to Article III courts during intrasession Senate recesses”).

24. E.g., *Evans v. Stephens*, 387 F.3d 1220, 1221–22, 1227 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 715 (2d Cir. 1962); *In re Farrow*, 3 F. 112, 117 (N.D. Ga. 1880).

25. See Ago, *supra* note 9, at 585–86 (“[T]he issue that has most frequently arisen under the Clause is when a ‘vacancy’ arises.”). For an interesting discussion of when a vacancy “happens” in the event of a contingent retirement (that is, a judge retiring only upon the occurrence of a specified event—generally the nomination or confirmation of a successor), see Madden, *supra* note 1, at 1155–72.

that “happen” should be read to mean “arise.”²⁶ Under such an interpretation, the vacancy did not “happen” during the recess, and thus cannot be filled absent the Senate’s advice and consent.²⁷ Others have argued that the timing of the vacancy’s creation is immaterial because in either case it is equally important that the position be filled.²⁸ Much like in the debate over the meaning of “the Recess,” courts and the executive branch have sided with the broad construction of “happen,” so as to include vacancies that exist, but did not arise, during the recess of the Senate.²⁹

The last major controversy surrounding the text of the Recess Appointments Clause is whether it applies to vacancies in Article III courts at all.³⁰ Article III provides federal judges with lifetime tenure, which they hold “during good Behaviour,” and salary, which “shall not be diminished” during their time in office.³¹ Alexander Hamilton explained in *Federalist* 79 that the Framers’ purpose in providing for lifetime tenure and salary was to shield the judiciary from political influence.³² Those opposing application of the Recess Appointments Clause to vacancies in the federal judiciary argue that the tenure and salary provisions, found further along in the Constitution than the Recess Appointments Clause, serve as implied limitations on the Clause’s scope.³³ Lifetime tenure requirements are directly at odds with the temporary commissions contemplated by the Recess Appointments Clause.³⁴ Thus, the “Vacancies” in the Recess Appointments Clause do not include Article III

26. See, e.g., William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 543–44 (2004); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1501–03 (2005).

27. Rappaport, *supra* note 26, at 1502–03.

28. See, e.g., 1 Op. Att’y Gen. 631, 631–32 (1823); Herz, *supra* note 4, at 445–46.

29. See, e.g., *Woodley*, 751 F.2d at 1012–13; *Allocco*, 305 F.2d at 712; *In re Farrow*, 3 F. at 113–16; 2 Op. Att’y Gen. 525, 528 (1832); 1 Op. Att’y Gen. 631, 631–32 (1823).

30. See *Woodley*, 751 F.2d at 1010–11; LOUIS FISHER, CONG. RESEARCH SERV., FEDERAL RECESS JUDGES 3 (2005), available at <http://www.senate.gov/reference/resources/pdf/RS22039.pdf> [hereinafter FISHER, FEDERAL RECESS JUDGES].

31. U.S. CONST. art. III, § 1.

32. Hamilton explained the policy as follows:

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the president, is equally applicable here. In the general course of human nature, *a power over a man’s subsistence amounts to a power over his will*. And we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

THE FEDERALIST NO. 79 (Hamilton), *supra* note 9, at 531 (footnote omitted); see also Reardon, *supra* note 3, at 867.

33. See Paul Ferris Soloman, Comment, *Answering the Unasked Question: Can Recess Appointees Constitutionally Exercise the Judicial Power of the United States?*, 54 U. CIN. L. REV. 631, 633–34, 646–47 (1985).

34. Curtis, *supra* note 6, at 1758; Soloman, *supra* note 33, at 638.

positions.³⁵ Conversely, there are those who argue that Article III positions can be filled by recess appointees.³⁶ They point to *Federalist* 67's explanation that the "Vacancies" in the Recess Appointments Clause refer to those of the "officers" described in the Advice and Consent Clause.³⁷ Because appointments to permanent federal judgeships are typically subject to the advice and consent of the Senate, these offices can also be filled by use of recess appointments.³⁸ Further, courts and commentators note that nearly every president, since the days of George Washington, has used the Recess Appointments Clause to fill vacancies in Article III courts.³⁹ Thus, they contend that presidents close in time to the ratification of the Constitution understood the Clause to apply to vacancies in the federal judiciary.⁴⁰ As with the other two debates, the expansive view has prevailed. Courts have upheld presidential power to make recess appointments to Article III positions.⁴¹

There are recurring problems with all of the textual arguments advocating a narrower interpretation of the Recess Appointments Clause. In effect, finding that the Clause has been improperly construed by past presidents and courts necessitates a conclusion that multiple presidents have unconstitutionally appointed federal judges.⁴² Further, accepting such textual arguments would cast doubt on the legitimacy of rulings that have been issued by judges over the course of the past two centuries.⁴³ Such dramatic consequences have caused

35. See Soloman, *supra* note 33, at 646–47.

36. See, e.g., *United States v. Allocco*, 305 F.2d 704, 705, 715 (2d Cir. 1962); Curtis, *supra* note 6, at 1769–70.

37. See Curtis, *supra* note 6, at 1769–70.

38. See THE FEDERALIST NO. 78 (Hamilton), *supra* note 9, at 522 ("As to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general . . ."); see also *Allocco*, 305 F.2d at 708–09.

39. See *United States v. Woodley*, 751 F.2d 1008, 1010 (9th Cir. 1985) (en banc); Herz, *supra* note 4, at 449; Curtis, *supra* note 6, at 1773; Madden, *supra* note 1, at 1170.

40. Curtis, *supra* note 6, at 1776 (referring to the presidential practice of George Washington as "'contemporaneous and weighty evidence of [the] true meaning' of the recess appointments clause" (alteration in original) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983))).

41. E.g., *Woodley*, 751 F.2d at 1011.

42. Hartnett, *supra* note 15, at 428 ("To conclude that recess appointments to Article III courts are unconstitutional would mean that every one of those presidents violated the constitution."); Herz, *supra* note 4, at 449 ("[P]residents going back to George Washington have made over 300 recess appointments to Article III courts. It is hard to find anyone—other than losing litigants or bitter senators—who argues that recess appointments of Article III judges are unconstitutional *per se*." (footnotes omitted)).

43. See Hartnett, *supra* note 15, at 428–29 (explaining that accepting such arguments "would also mean that every one of those judges did [violate the Constitution] as well—not in the way they decided a particular case—but in exercising judicial power in the first place, indeed at the very moment that they took their oath to 'faithfully and impartially' discharge their duties").

courts and many commentators to interpret the Clause expansively, in a manner that is in line with the traditional presidential understanding.⁴⁴

This Article is limited to the topic of appointments to Article III courts and focuses on the unique characteristics of the contemporary federal judiciary. It argues that the Recess Appointments Clause should not be used to fill vacancies on Article III courts because, when considered in the context of the contemporary federal judiciary, the purposes underlying the Clause's ratification are no longer met. My analysis is not a text-based argument, and thus does not yield the unsettling ramifications described above. Unlike a textual approach, this Article advocates a "living Constitution"⁴⁵ approach that does not necessitate the conclusion that George Washington and his presidential successors trampled on the Constitution. It simply recognizes that changes in the size and structure of the federal judiciary, technology, and recent events require an evolving view of the Recess Appointments Clause.⁴⁶ In doing so, this Article looks to the purpose, rather than the broad text, of the Recess Appointments Clause, and asks whether the Clause's goals are still met by its contemporary application to the federal judiciary. It concludes that the differences between today's judiciary and the judiciary that existed early in our nation's history necessitate a new consideration of the Recess Appointments Clause's scope that forbids its use to fill Article III vacancies. Thus, it seeks to provide a new interpretation heading into the future, rather than one challenging recess appointments by past presidents.

Part II of this Article begins by discussing the size, composition, and structure of the early federal judiciary. Part III then contrasts these attributes with those of the twenty-first century judiciary. Next, Part IV examines the purpose behind the Recess Appointments Clause, and concludes that in drafting it, the Framers were primarily concerned with the public interest and the smooth functioning of the judiciary. It then discusses whether these functions are still served by recess appointments to Article III courts. Part V analyzes recent events, such as the Senate's "faux sessions"⁴⁷ that were convened during the Thanksgiving and Winter Breaks in 2007 to prevent

44. See *Evans v. Stephens*, 387 F.3d 1220, 1222–23 (11th Cir. 2004); *Woodley*, 751 F.2d at 1009–11; *United States v. Allocco*, 305 F.2d 704, 708–09 (2d Cir. 1962); *In re Farrow*, 3 F. 112, 115–16 (N.D. Ga. 1880); Hartnett, *supra* note 15, at 424.

45. For a detailed discussion of the "living Constitution" and its key proponent, Justice Black, see Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

46. See *infra* Part IV.

47. See Kane, *supra* note 21 ("Reid employed a rarely used parliamentary tactic by scheduling 'pro forma' sessions twice a week until early December . . ."); Noam N. Levey, *The Senate Isn't Exactly Out of Town*, L.A. TIMES, Nov. 18, 2007, at A20 ("The expected faux sessions will be part of a rare gambit by [Reid] to prevent President Bush from making any so-called recess appointments, as presidents sometimes do when a nomination is in trouble in the Senate.").

President George W. Bush from using his recess appointment power.⁴⁸ Part VI concludes that these contemporary events, coupled with the structure of today's federal judiciary, indicate that the policy behind the Recess Appointments Clause is no longer met by using its powers to fill vacancies on Article III courts. Thus, while it was at one time crucial to the effective functioning of the federal judiciary, public policy is no longer furthered by such a construction. Therefore, with the policy behind the Recess Appointments Clause no longer served, the Clause should no longer be interpreted to allow the president to fill vacancies in Article III courts.

II. SIZE, COMPOSITION, AND STRUCTURE OF THE EARLY FEDERAL JUDICIARY

The federal judiciary envisioned by the Framers differs drastically from that which we see today. Article III authorized the creation of a judiciary and set forth basic jurisdictional limitations, but it did not affirmatively put in place a federal judicial system.⁴⁹ In fact, the Constitution only established that there must be a Supreme Court, but that Congress could, at its discretion, "ordain and establish" inferior federal courts.⁵⁰ Congress did so with the Judiciary Act of 1789.⁵¹ This Act was passed in the First Session of Congress and established district and circuit courts, and set the number of justices on the Supreme Court.⁵²

First, the Act provided that the Supreme Court was to consist of six Justices: five associate Justices and one Chief Justice.⁵³ Next, it set forth the thirteen judicial districts.⁵⁴ Each of the eleven states received one district, except Virginia and Massachusetts, which received two each.⁵⁵ Each district was to consist of only one district judge, which Congress mandated must hold four sessions annually.⁵⁶ Congress granted original jurisdiction to these courts over

48. Kane, *supra* note 21 ("[Reid], in a showdown with the White House over executive branch nominations, refused yesterday to formally adjourn the chamber for a planned two-week Thanksgiving break in order to thwart President Bush's ability to make recess appointments."); Levey, *supra* note 47 ("Reid asked a few Democratic senators who plan to be close to the capital during the holidays . . . to gavel open and shut the Senate for two days each week.").

49. See U.S. CONST. art. III, §§ 1–2.

50. U.S. CONST. art. III, § 1; *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

51. Judiciary Act of 1789, ch. 20, §§ 2–4, 1 Stat. 73, 73–75.

52. *Id.* §§ 1–4, 1 Stat. at 73–75.

53. *Id.* § 1, 1 Stat. at 73.

54. *Id.* § 2, 1 Stat. at 73.

55. *Id.* Virginia received one district that covered modern-day Virginia and West Virginia, as well as one to cover modern-day Kentucky. Massachusetts's two districts were comprised of modern-day Massachusetts and modern-day Maine. Edward A. Hartnett, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison: Marbury's Errors?: Not the King's Bench*, 20 CONST. COMMENT. 283, 285 n.4 (2003); Brian C. Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 WASH. L. REV. 271, 303 n.116 (2005).

56. Judiciary Act of 1789 § 3, 1 Stat. at 73–74.

lesser offenses,⁵⁷ and prohibited state courts from presiding over trials involving federal criminal offenses, except as Congress authorized.⁵⁸ Last, the Act created three United States circuit courts.⁵⁹ These courts encompassed the eleven existing states and were divided into the eastern, middle, and southern circuits.⁶⁰ The Act mandated that the circuit courts convene twice annually.⁶¹ The circuit courts were granted non-exclusive original jurisdiction over controversies that involved more than five hundred dollars,⁶² original jurisdiction concurrent with the district courts in cases of more serious crimes,⁶³ and appellate jurisdiction over the district courts.⁶⁴ However, unlike with the district courts, the Act created no new judgeships to fill the circuit courts.⁶⁵ Instead, two Supreme Court Justices and one district court judge sat on these panels, any two of whom would constitute a quorum.⁶⁶ Consequently, no federal judges sat on just one court. Each district judge sat on his respective district court, but also periodically convened in the circuit court to hear appeals and try cases.⁶⁷ Similarly, Supreme Court Justices sat on the Supreme Court, but also “rode” the three circuits.⁶⁸

57. *Id.* § 9, 1 Stat. at 76–77 (“[T]he district courts(c) shall have . . . cognizance . . . where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted . . .”); see also Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1545 (1986) (discussing the extent of jurisdiction of the federal courts as a result of the Judiciary Act of 1789).

58. Judiciary Act of 1789 § 11, 1 Stat. at 78–79.

59. *Id.* § 4, 1 Stat. at 74.

60. The Maine and Kentucky districts were excluded from the circuits. *Id.*; DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* 23 (1971); Kalt, *supra* note 55, at 303 n.116.

61. Judiciary Act of 1789 § 4, 1 Stat. at 74.

62. *Id.* § 11, 1 Stat. at 78 (“[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature . . . where the matter in the dispute exceeds . . . five hundred dollars . . .”).

63. *Id.* § 11, 1 Stat. at 78–79 (“[Circuit courts] shall have exclusive cognizance of all crimes . . . except where this act otherwise provides, . . . and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein.”).

64. *Id.* § 11, 1 Stat. at 79 (“[T]he circuit courts shall also have appellate jurisdiction from the district courts . . .”).

65. See *id.* § 4, 1 Stat. at 74–75.

66. *Id.* Congress stated that no judge could vote on an appeal stemming from his own decision. *Id.* § 4, 1 Stat. at 75.

67. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 221–22 (1999).

68. Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 278 (2005) (“Justices of the Supreme Court spent most of their time exercising original jurisdiction that would have been forbidden to the Supreme Court itself. This is what circuit riding involved, which is why both Chief Justice John Jay and Justice Samuel Chase questioned its constitutionality.”); see also Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1757 (2003).

Many of the Framers were themselves members of the First Congress.⁶⁹ Because the First Congress enacted the statute establishing the first federal judiciary, this legislation provides some key insight into what the Framers had in mind when they drafted the Recess Appointments Clause.⁷⁰ The structure of the Judiciary Act indicates that they could not have envisioned the type of federal judiciary that we have today, consisting of more than one thousand judges and thirteen circuits.⁷¹ Instead, the Framers put in place a system consisting of only nineteen federal judges: six Supreme Court Justices and thirteen district judges.⁷² In such a system, the death or resignation of a single federal judge could lead to a breakdown in the functioning of the judiciary.⁷³ Thus, the need for keeping these offices continually occupied was great.⁷⁴

The six Supreme Court Justices were spread thin, sitting on not only their own Court, but convening on circuit panels across the country.⁷⁵ Early federal judges found their jobs to be stressful and many Supreme Court Justices spoke out about the burdens of circuit riding.⁷⁶ In a 1792 letter to Congress, the

69. *Myers v. United States*, 272 U.S. 52, 174 (1926) (“[The initial] construction of the Constitution [was] made by a Congress which was [composed of] a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government.”); see also David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 311–12 (1993).

70. See *Myers*, 272 U.S. at 175; *James v. Watt*, 716 F.2d 71, 76 (1st Cir. 1983) (“The views and action of the first Congress . . . are entitled to considerable weight in cases like this of constitutional interpretation.”). But see Michael Bhargava, Comment, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CAL. L. REV. 1745, 1747–49 (2006) (attacking the use of the “First Congress canon” in ascertaining the Framers’ intent).

71. For a detailed breakdown of the total number of federal judges between 1990 and 2006, see U.S. Courts, Total Judicial Officers, <http://www.uscourts.gov/judicialfactsfigures/2006/Table101.pdf> (last visited Mar. 24, 2009) [hereinafter Total Judicial Officers Table].

72. See Judiciary Act of 1789, ch. 20, §§ 1, 3, 1 Stat. 73, 73; Charles W. Nihan, *A Study in Contrasts: The Ability of the Federal Judiciary to Change Its Adjudicative and Administrative Structures*, 44 AM. U. L. REV. 1693, 1697 (1995).

73. See 1 Op. Att’y Gen. 631, 632 (1823) (stating that, in some cases, “the vacancy may paralyze a whole line of action in some essential branch of our internal police”).

74. See *id.* (“[T]he public interests may imperiously demand that it [the vacancy] shall be immediately filled.”).

75. Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1326 (2007) (noting that circuit riding “imposed extreme hardships on Justices, especially in the first half of the nineteenth century when long distance travel was so difficult and onerous”); John V. Orth, *John Marshall & “Debts Which Ought Never to Have Been Contracted,”* 4 GREEN BAG 2D 49, 50 (2000) (“[C]ircuit riding was never easy for the elderly men typically appointed to the Supreme Court. Even as transportation improved to make travel less difficult, the nation expanded in size to make the distances to be covered ever greater.”).

76. “The justices were unanimous in their objection to riding circuit.” HENDERSON, *supra* note 60, at 41. They argued both that it was too physically taxing and that they believed it to be unconstitutional because it vested Justices of the Supreme Court, who are constitutionally entrusted with appellate review, with the responsibility of presiding over trials. They contested that, “except in two cases, the Constitution confined the supreme court, and consequently its

Justices spoke of the rigors attending circuit court responsibilities and implored Congress to remove the circuit-riding requirement:

[T]he task of holding twenty-seven circuit courts a year, in the different States, from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which, considering the extent of the United States, and the small number of judges, is too burdensome.⁷⁷

They further noted that “some of the present judges do not enjoy health and strength of body sufficient to enable them to undergo the toilsome journeys.”⁷⁸ District judges encountered similar difficulties in juggling their circuit and district court responsibilities. In the period between 1789 and 1797, the district courts tried few cases, with the busiest district, New York, trying 269 cases.⁷⁹ However, judges found more than their share of work at the circuit level, wherein more than three-thousand cases were tried during the same period.⁸⁰ The district and circuit courts met in different locations throughout the states, often with little travel time between sessions.⁸¹ Despite these challenges, Congress foisted other responsibilities on district and circuit courts, such as conducting naturalization proceedings.⁸²

In this environment, the loss of one district judge would halt any cases from being heard in a state’s district court and could lead to congestion in the circuits as well. Similarly, in riding the circuits, Supreme Court Justices traveled thousands of miles and the loss of any one Justice thrust additional burdens on the others.⁸³ It is in such an environment that the Recess Appointments Clause must be understood. To keep in place the structure,

judges, to appellate jurisdiction.” *Id.* By 1792, two Justices (Jay and Johnson) had resigned, at least in part, because of the burdens of circuit riding. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 19 (1993). For a detailed discussion of circuit riding, see FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 14–55 (1928).

77. 1 AM. STATE PAPERS MISC. 52, 52 No. 32 (1792).

78. *Id.* But see David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1711–12 (2007) (arguing that circuit riding should be reinstituted because it made Justices more accessible to the public, yielding a “relationship of camaraderie and respect between the Justices and local citizens, judges, and members of the bar” (internal quotation marks omitted)).

79. HENDERSON, *supra* note 60, at 62.

80. *Id.* at 72. Of the cases tried by the circuit courts, 2847 were civil common-law cases. *Id.* at 73.

81. *Id.* at 44–45 (“[T]he district and circuit courts in nine states met at two locations, in three states at three locations, and in Kentucky at a single location.”).

82. *Id.* at 48.

83. See *id.* at 42. In 1790, Justice Iredell rode 1900 miles on the Southern circuit and 1800 miles to and from Philadelphia. *Id.* By 1838, when the circuits had expanded to nine, Justice McKinley reported traveling 10,000 miles in one year. FRANKFURTER & LANDIS, *supra* note 76, at 49.

stability, and efficiency of the judiciary, it was essential that the president be able to act immediately to "fill up all Vacancies that may happen during the Recess of the Senate."⁸⁴

III. THE CONTEMPORARY JUDICIARY

The twenty-first century judiciary is very different from that which was put in place by the First Congress. Today's judiciary includes many more judges, circuits, and districts.⁸⁵ Each court has distinct functions, and active judges sit on just one court at a time.⁸⁶ Additionally, improved transportation and the position of "senior judge" allows courts to better adapt to the increased caseloads that accompany deaths, resignations, and unexpected influxes of cases.⁸⁷ These distinct aspects of the contemporary federal judiciary alter the necessity of applying the Recess Appointments Clause to Article III vacancies.

The framework of the Judiciary Act of 1789 remained in place for more than a century.⁸⁸ However, during this time, developments in America required some minor adjustments to this structure. America was growing in size and the federal judiciary had evolved into a highly professional organization, necessitating a more formal and tiered review process.⁸⁹ Thus, Congress reorganized the United States circuit court system into nine circuits, expanded the Supreme Court to nine Justices,⁹⁰ and then created the position of circuit judge.⁹¹ Nonetheless, United States circuit courts continued to exercise

84. U.S. CONST. art. II, § 2, cl. 3.

85. *But see* David L. Cook et al., *Criminal Caseloads in U.S. District Courts: More than Meets the Eye*, 44 AM. U. L. REV. 1579, 1581 (1995) (arguing that even though there are more district judges and their caseloads are not increasing statistically, the notion of judicial workload is not adequately reflected by measuring case filings; for example, today's federal courts see many more drug distribution cases than drug possession cases, and distribution cases tend to require more time and work from judges).

86. *See* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 715 (2000).

87. *See infra* notes 109–18 and accompanying text.

88. Eric J. Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 371 (1997) ("One hundred twenty-two years after the first Judiciary Act, the federal courts were restructured into a form which has basically remained intact to this day.").

89. *See* William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1150–51 (1996); Carl Tobias, *Modern Federal Judicial Selection*, 67 U. CIN. L. REV. 527, 532 (1999) (reviewing SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997)); Bryan Wright, Note, *But What Will They Do Without Unpublished Opinions?: Some Alternatives for Dealing with the Ninth Circuit's Massive Caseload Post F.R.A.P. 32.1*, 7 NEV. L.J. 239, 258–59 (2006). By 1860, there were a total of thirty-three states and forty-three district court judgeships. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 342 (1993).

90. Judiciary Act of 1837, ch. 34, §§ 1–2, 5 Stat. 176, 176–77.

91. Circuit Judges Act of 1869, ch. 22, 16 Stat. 44, 44–45; Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members*

“mixed appellate-trial jurisdiction” and Supreme Court Justices continued to ride circuit.⁹² Even those revisions turned out to be insufficient to handle the growing nation’s needs.

In 1891, the Evarts Act, commonly referred to as the “Circuit Courts of Appeals Act,” formally replaced the structure first enunciated by the Judiciary Act of 1789.⁹³ This Act created nine “circuit courts of appeals,” each consisting of two circuit judges and one district judge.⁹⁴ With the assignment of two circuit judges per court, the practice of Supreme Court Justice circuit riding formally ended.⁹⁵ These circuit courts of appeals were delegated the appellate jurisdiction that was previously granted to the United States circuit courts.⁹⁶ This rendered the United States circuit courts all but obsolete and they were soon thereafter abolished.⁹⁷ The newly created circuit courts of appeals were to deal solely with appeals from district courts, and no longer to conduct trials of their own.⁹⁸ America now had a three-tier federal judiciary, with the district court exercising trial jurisdiction and the other two focused solely on reviewing those decisions.⁹⁹

The system set in place by the Circuit Courts of Appeals Act remains today, but has been considerably expanded.¹⁰⁰ There are presently thirteen circuits¹⁰¹

of the United States Supreme Court, 47 OHIO ST. L.J. 799, 833 (1986); Gerald N. Rosenberg, *The Unconventional Conventionalist*, 2 GREEN BAG 2D 209, 212 (1999) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998)).

92. Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 603 (1989).

93. Circuit Courts of Appeal (Evarts) Act, ch. 517, 26 Stat. 826 (1891).

94. *Id.* §§ 2–3, 26 Stat. at 826–27.

95. See *id.*; Cynthia J. Rapp, *In Chambers Opinions by Justices of the Supreme Court*, 5 GREEN BAG 2D 181, 183 (2002); Glick, *supra* note 68, at 1755.

96. Circuit Court of Appeals Act § 2, 26 Stat. at 826 (“[T]here is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction . . .”).

97. Under the Circuit Courts of Appeals Act, the U.S. circuit courts could no longer entertain appeals, because “all appeals by writ of error otherwise, from . . . district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established . . .” *Id.* § 4, 26 Stat. at 827. The U.S. circuit courts were then abolished in 1911. Act of Nov. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

98. See Circuit Court of Appeals Act § 4, 26 Stat. at 827.

99. See Carl Tobias, *Electoral/Judicial Reform: Dear Chief Judge Schroeder*, 13 STAN. L. & POL’Y REV. 161, 162 (2002); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 913 (1983).

100. See Gribbin, *supra* note 88, at 371 (noting many of those differences, including the carving out of the Tenth and Eleventh Circuits, the Federal Circuit, and the end of the right of a second appeal from the courts of appeals to the Supreme Court).

101. Twelve of these are geographic and include the United States Courts of Appeals for the First through Eleventh Circuits, and the D.C. Circuit. The thirteenth is a specialized court called the Court of Appeals for the Federal Circuit. United States Courts of Appeals, <http://www.uscourts.gov/courtsofappeals.html> (last visited Mar. 24, 2009).

and ninety-four geographic districts.¹⁰² Over time, the membership of all of these courts has increased considerably. Today, the courts of appeals are allotted a total of 178 active circuit judges to serve among the thirteen circuits.¹⁰³ The ninety-four district courts are allocated a total of 678 seats to be filled by active district judges.¹⁰⁴ These figures evidence the drastic changes that the federal judiciary has undergone since the early days of our nation. No longer does just one judge staff each district.¹⁰⁵ Although federal caseloads are admittedly heavy,¹⁰⁶ the size of the judiciary prevents the death or retirement of a single judge from yielding a total shutdown of a court. Unlike the eighteenth century, the administration of our whole judicial system is not entrusted to just nineteen men, nor is a judge responsible for duties on multiple different courts.¹⁰⁷ Instead, today's federal judiciary consists of nearly one thousand active seats, a clear demarcation among the duties of the different judges, and more tightly confined geographic districts than those established by the First Congress.

But these figures do not tell the full story. Throughout "the first eight decades of the federal judiciary, Congress made no provision for the retirement of Article III judges."¹⁰⁸ Thus, many judges found that for economic reasons, retirement was not an option.¹⁰⁹ Not only is a retirement package available to judges today, but § 371 of Title 28 of the United States Code permits judges who are at least sixty-five years old and have served in the federal judiciary for at least fifteen years to assume "senior status."¹¹⁰ Under such an arrangement, the judge "may retain the office but retire from regular active service after

102. These include at least one in each state, the District of Columbia, the Virgin Islands, Guam, the Northern Mariana Islands, and Puerto Rico. U.S. Courts, Frequently Asked Questions, <http://www.uscourts.gov/faq.html> (last visited Mar. 24, 2009).

103. 28 U.S.C.A. § 44(a) (West 2006 & Supp. 2008); *see also* Total Judicial Officers Table, *supra* note 71 (citing numbers of circuit judges from 1990 to 2006).

104. 28 U.S.C. § 133(a) (2000 & Supp. V 2005); *see also* Total Judicial Officers Table, *supra* note 71.

105. *See supra* note 56 and accompanying text.

106. In 2005, each circuit judge signed an average of fifty-two written opinions per year. U.S. Court of Appeals, Judicial Caseload Profile, <http://www.uscourts.gov/cgi-bin/cmsa2005.pl> (last visited Mar. 24, 2009). During this same year, the 678 district judges averaged 488 filings each. U.S. District Court, Judicial Caseload Profile, <http://www.uscourts.gov/cgi-bin/cmsd2005.pl> (last visited Mar. 24, 2009).

107. George, *supra* note 67, at 224 (explaining that "[i]n 1911, Congress took the last step toward establishing the modern intermediate appellate system" by establishing the circuit courts of appeals and granting each at least three permanent circuit judges).

108. Van Tassel, *supra* note 89, at 395.

109. *Id.* ("Aged judges were forced to choose between resigning from the bench and losing their salary, or continuing in office (often despite incapacity) in order to retain financial support.").

110. 28 U.S.C. § 371(c) (2000). A judge needs one less year of service for each year of age over sixty-five. For example, a sixty-six year old judge need only serve fourteen years of service before being eligible for senior status. *Id.*

attaining the age and meeting the service requirements.”¹¹¹ Thus, judges may retire without actually having to leave the bench. In so doing, the judge’s seat technically becomes “vacant” and a new candidate may be appointed to fill the seat.¹¹² The retired judge can then continue to “perform such judicial duties as he is willing and able to undertake,” without being counted toward his court’s seat quota.¹¹³

This arrangement has essentially become the norm for federal judges.¹¹⁴ In 2006, 414 district and court of appeals judges were on senior status.¹¹⁵ Although many of these judges take reduced caseloads, they have proven to be a valuable resource to the federal judiciary by sitting on other courts as visiting judges and assisting the active members of their court in handling increased caseloads.¹¹⁶ Title 28 permits both circuit and district senior judges to sit by designation on courts of appeals.¹¹⁷ Thus, when a circuit is experiencing an unusually heavy caseload or has recently lost some active judges, it may ask

111. *Id.* § 371(b)(1); *see also id.* § 294(b) (“Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned”); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 993 (2007) (“In the twentieth century, it became possible for federal judges to retire from full service without resigning by taking ‘senior status.’”).

112. *See* 28 U.S.C. § 371(d) (“The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires under this section.”).

113. *Id.* § 294(b).

114. *See* Van Tassel, *supra* note 89, at 399 (indicating that federal judges overwhelmingly opt for senior status rather than retirement when they become eligible).

115. Among these judges, 103 were senior circuit judges and 311 were senior district judges. Total Judicial Officers Table, *supra* note 71. These judges often compose a large percentage of each of their court’s total judges. For example, the “total number of authorized judgeships in the Article III courts in 2005 was approximately 870, and the number of serving Article III judges, which includes ‘Senior Judges’ in the inferior federal courts, was over 1200.” Jackson, *supra* note 111, at 1014 (footnote omitted); *see also* Gregory S. Fisher, *Breaking Up Is Hard to Do: A Brief Summary of New Congressional Action to Split the Ninth Circuit Court*, ALASKA BAR RAG, May–June 2003, at 9 (reporting that, in 2003, the largest circuit, the Ninth Circuit Court of Appeals, had twenty-one senior judges serving alongside the circuit’s twenty-five active judges).

116. These judges have discretion over the size of their caseload. Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1166–67 (2007); Benjamin G. Shatz & Judge George P. Schiavelli, *Barristers Tips: Judges, Justices, Magistrates, and Commissioners*, L.A. LAW., Oct. 2005, at 10. These judges perform a key role in assisting judges on their courts and elsewhere. *See* Statement by Judith Resnick, Arthur Liman Professor of Law, Yale Law School, to the Commission on Structural Alternatives for the Federal Courts of Appeals (Apr. 24, 1998), available at <http://www.library.unt.edu/gpo/csafca/hearings/newyork/0427res.htm>; *see also* Cook, *supra* note 85, at 1582 n.28 (“[T]he work performed by senior judges tends to offset the vacancy rate”).

117. 28 U.S.C. § 291(a) (authorizing circuit judges to sit on other circuits); *id.* § 292(a) (authorizing district judges to sit on courts of appeals); *id.* § 294(d) (permitting senior judges to sit by designation on panels outside of their circuits).

senior circuit or district court judges to sit on panels.¹¹⁸ This arrangement provides the judiciary with the flexibility and means to respond to changes as they happen.

The federal judiciary's flexibility is heightened by the abilities of active district and circuit judges to step into each other's shoes when duty so calls. Through congressional authorization of inter- and intra-district transfers, demarcation between district and circuit judges has become less rigid. Congress has authorized the chief judge of each circuit to temporarily designate a district judge to fill a circuit court position, or for a circuit judge to fill any district court position within the circuit's bounds.¹¹⁹ Further, the chief judge may shuffle active judges from one district within her circuit to another in order to handle increased caseloads in that district, temporarily cope with the loss of a judge, or meet any other goal that is "in the public interest."¹²⁰ Lastly, the Chief Justice of the Supreme Court may temporarily move active district and circuit judges from one circuit to another "upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises."¹²¹ Consequently, senior judges and transfers serve as valuable resources for coping with the sudden need for more judges on a particular court.

In addition to differences between the structure of today's judiciary and the one envisioned by the Framers, technological advancements relating to communication and transportation increase the federal judiciary's ability to handle sudden vacancies. The Framers designed our Constitution in days predating the telegraph, at a time when the horse was the most common mode of transportation.¹²² These obstacles made it difficult to quickly coordinate

118. Specifically, § 294(d) provides:

The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit.

Id. § 294(d).

119. *Id.* §§ 291(b), 292(a).

120. *See id.* § 292(b).

121. *Id.* § 292(d) (This section only applies to district judges.). Under § 291(a), the circuit-judge corollary, such a certificate of necessity may not even be necessary to temporarily move a circuit judge to another circuit. *Id.* § 291(a). Rather, all that is required is that it be "in the public interest." *Id.* ("The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit.").

122. *O'Reilly v. Morse*, 56 U.S. (15 How.) 62, 63-64 (1854) ("[T]he practicability and great utility of the invention was fully established by the telegraph constructed under the superintendence of Morse, by means of an appropriation made by the Congress of the United States for the purpose, and put in operation between the cities of Washington and Baltimore, in the year 1844."); *THE CAMBRIDGE ENCYCLOPEDIA* 213 (David Crystal ed., 2d ed. 1994) (The automobile was not invented until 1886.).

and execute the shifting of judges throughout the judicial structure.¹²³ Recognizing the need for filling vacancies without delay, Congress enacted the Recess Appointments Clause as a reasonable compromise to an administrative headache. Today, by contrast, judges can fly from one part of the country to another in a matter of hours. The Chief Judge of the Tenth Circuit can notify the Chief Justice of the Supreme Court of his urgent need for more judges, and he can contact the Chief Judge of the Second Circuit minutes later. The quick flow of communication and the availability of rapid modes of transportation permit the judiciary to respond effectively to what would have been insurmountable challenges at the time of our nation's founding.¹²⁴

The increased lifespan and tenure of judges also make urgent vacancies less frequent. Of the judges who joined the federal bench between 1789 and 1809, the average Supreme Court Justice served for only fourteen years and the average lower court judge for sixteen.¹²⁵ This was partially a function of short lifespan, as judges typically died in their mid-sixties.¹²⁶ However, early judges also expressed higher instances of job dissatisfaction and often left the bench for private practice.¹²⁷ Today, by contrast, judges live and serve longer. Among federal judges whose service terminated between 1983 and 2003, they averaged twenty-four years of service.¹²⁸ On average, lower court judges lived to seventy-five and Supreme Court Justices lived to eighty-eight years of age.¹²⁹ Very rarely do judges resign from their posts altogether; instead they assume senior status and remain on the bench.¹³⁰ In fact, contingent

123. Jeffrey L. Rensberger, *The Amount in Controversy: Understanding the Rules of Aggregation*, 26 ARIZ. ST. L.J. 925, 936 (1994) (in the nineteenth century "transportation to a remote appellate court was difficult").

124. Cf. *Rhode Island v. Byrne*, 2007 R.I. Super. LEXIS 163, at *2 (Nov. 5, 2007) ("Modern society is mesmerized by . . . technological innovations not imagined when the framers put quill to parchment.").

125. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 618 chart 4 (2005).

126. The average lower court judge died at age sixty-four and the average Supreme Court Justice at sixty-seven. *Id.*

127. Van Tassel, *supra* note 89, at 346 ("The highest departure rate for reasons other than health or age (32%) occurred during the decade when the judiciary was at its smallest: 1789–1799.").

128. This number is the same for Supreme Court Justices and judges of the lower federal courts alike. Resnik, *supra* note 125, at 618 chart 4.

129. *Id.*

130. See Van Tassel, *supra* note 89, at 399 ("Of the 211 judges who chose to reduce their workload once they became eligible to do so, [only] 7% resigned completely."); see also Resnik, *supra* note 125, at 619 ("[J]udges understand the heavy workload of their colleagues, and while many take 'senior status,' they continue to shoulder a large proportion of the work."); Arnold H. Lubasch, *At Retirement Age, Federal Judges Choose to Help Reduce Court's Caseload*, N.Y. TIMES, Apr. 5, 1987, at 48 ("Judge Pollack is one of 15 senior judges on the [S.D.N.Y.] court, judges who have reached retirement age and have taken senior status They contribute their experience to reduce the heavy caseload of the court.").

retirements have become quite common.¹³¹ In these situations, the judge specifies the conditions under which she will resign, often requiring the nomination or confirmation of a judge to fill her seat.¹³² Thus, not only do judges serve longer, but fewer of their vacancies result from sudden resignations.¹³³ Seats remain occupied longer, typically only becoming vacant after the president and Congress have had an opportunity to consider potential candidates for lifetime appointments.¹³⁴ Chief judges of each of the respective courts can better anticipate vacancies, thus permitting them to plan methods for coping with such a loss by utilizing transfers or shifting cases from one judge to another.

It is in this contemporary context that the Recess Appointments Clause should be understood. Today's judiciary is of a much larger size than that created in 1789.¹³⁵ It no longer relies on just one judge per district or judges serving on multiple courts at a time, but rather a large system of tiered review.¹³⁶ Today's federal judiciary, with its access to instantaneous communication, quick transportation, large pools of senior judges, longer judicial tenure, and mechanisms for transferring judges, provides much more

131. See Madden, *supra* note 1, at 1155 (noting the "increasingly common" practice of prospective and contingent retirements). The most recent high profile contingent vacancy was that of Supreme Court Justice Sandra Day O'Connor. Her resignation letter specified that her retirement would commence once a successor to her seat was confirmed. Letter from Justice Sandra Day O'Connor to President George W. Bush (July 1, 2005), <http://www.supremecourtus.gov/publicinfo/press/oconnor070105.pdf>. Justice Samuel Alito was confirmed by a fifty-eight to forty-two vote and replaced Justice O'Connor on January 31, 2006. Robert Cohen, *Alito Joins Supreme Court After Partisan Senate Vote*, STAR-LEDGER (Newark, N.J.), Feb. 1, 2006, at 1; Adam Liptak, *Alito Vote May Be Decisive in Marquee Cases this Term*, N.Y. TIMES, Feb. 1, 2006, at A1.

132. See Madden, *supra* note 1, at 1155 (discussing the implications of the "increasingly common practice of life-tenured judges making prospective retirements—anticipated on a future date certain or contingent upon the confirmation, appointment, or qualification of a successor").

133. See Van Tassel, *supra* note 89, at 349 ("The resignation rate steadily declined from 8% in the 1920s to 4% in the 1940s. . . . [I]t has fluctuated only slightly since the 1940s . . .").

134. See, e.g., Peter Baker, *Parties Gear Up for High Court Battle*, WASH. POST, June 27, 2005, at A2 ("Rehnquist, 80, has thyroid cancer, and many officials, jurists and activists believe he will step down after the court's current term ends today. . . . The White House has been preparing for a nomination for four years and almost certainly would be ready to announce a choice right away."); Jan Crawford Greenburg, *2 to Watch for Vacancy Have Much in Common*, CHI. TRIB., June 26, 2005, at A1 ("Federal appeals court Judges J. Michael Luttig and John Roberts have emerged as two of the leading contenders to take over the center seat of the U.S. Supreme Court if Chief Justice William Rehnquist should retire."); see also Madden, *supra* note 1, at 1147 (contending that the practice of contingent retirement "permits the President to 'prenominate' and the Senate to 'preconfirm' individuals for offices that are not vacant, and then for the President to appoint any pre-nominated, preconfirmed individual once the office becomes available").

135. See *supra* notes 103–04, 115, and accompanying text.

136. See *supra* notes 85–86 and accompanying text.

flexibility than that put in place by the First Congress.¹³⁷ These realities lend a foundation on which to view the Recess Appointments Clause.

IV. FULFILLING THE CLAUSE'S PURPOSES

The Recess Appointments Clause undoubtedly fulfilled a crucial function early in American history. With only one judge per district and the shared responsibilities of district judges and Supreme Court Justices, the death or resignation of any one judge could lead to a catastrophic breakdown in the business of the federal judiciary.¹³⁸ Such a concern was of paramount importance to the Framers, as reflected by Alexander Hamilton's explanation that should a vacancy happen during the recess of the Senate, it "might be necessary for the public service to fill [it] without delay."¹³⁹ Thus, in such a circumstance, the president may grant a temporary commission without seeking the advice and consent of the Senate.¹⁴⁰ The question becomes: does this same necessity still exist today? If not, should the Recess Appointments Clause still be applied to the federal judiciary, or with its underlying purpose eliminated, should other constitutional provisions be given more weight?

Most arguments in favor of applying the Recess Appointments Clause to vacancies in the federal judiciary in some way revolve around the notions of "governmental necessity" and the "public good."¹⁴¹ In 1823, Attorney General William Wirt¹⁴² penned the first official executive branch evaluation of the Recess Appointments Clause.¹⁴³ In his analysis of the Clause, he outlined the Framers' reasons for vesting the power to make recess appointments solely in the hands of the president. He explained that in the event of a vacancy, the "office may be an important one; the vacancy may paralyze a whole line of action in some essential branch of our internal police."¹⁴⁴ With these concerns in mind, he explained that "the public interests may imperiously demand that it shall be immediately filled."¹⁴⁵ Subsequent commentators have reiterated these rationales behind the Clause, and agreed that exigency and the public interest were of utmost concern to the Framers. For example, a note by Thomas A. Curtis, which was cited extensively in the Ninth Circuit's recess

137. See *supra* notes 108–34 and accompanying text.

138. See *supra* notes 72–74 and accompanying text.

139. THE FEDERALIST NO. 67 (Hamilton), *supra* note 9, at 455.

140. See U.S. CONST. art. II, § 2, cl. 3.

141. See *infra* note 148.

142. Attorney General Wirt served during the Monroe and Adams Administrations from 1817 to 1829. James M. O'Fallon, *The Frank Nash Inaugural Lecture—Under Construction: The Constitution and the Missouri Controversy*, 77 OR. L. REV. 381, 384 (1998).

143. 1 Op. Att'y Gen. 631, 631 (1823) ("The question . . . is, 'whether, under the constitution, you can fill the vacancy by a commission to expire at the end of the next session?'").

144. *Id.* at 632.

145. *Id.*

appointment case of *United States v. Woodley*,¹⁴⁶ identifies the “main purpose” of the Recess Appointments Clause as serving to “promote government continuity and effectiveness by ensuring that important federal offices would not remain vacant.”¹⁴⁷ Courts and commentators have repeated these as being the underlying purposes of the Clause time and time again.¹⁴⁸

Nonetheless, while paying lip service to the Framers’ reasoning behind the Recess Appointments Clause, courts and scholars have all but brushed aside the underlying rationale of the Clause in favor of arguments centered on historical practice and textual construction.¹⁴⁹ In so doing, the functionality of the Clause is lost. This reliance on historical practice stems from a fundamental misunderstanding of the role of history in constitutional interpretation. The practices of early presidents and Congresses are certainly useful in ascertaining the Framers’ intent for certain constitutional provisions.¹⁵⁰ What differs with the Recess Appointments Clause is that the Federalist Papers, courts, executive branch officials, and commentators have already recognized the intent behind the Clause.¹⁵¹ The problem moves from

146. 751 F.2d 1008 (9th Cir. 1985) (en banc) (permitting a recess appointee to preside over a defendant’s trial). The dissent cited Mr. Curtis’s note a total of twelve times. *Id.* at 1014–32 (Norris, J., dissenting).

147. Curtis, *supra* note 6, at 1768.

148. See, e.g., *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (“[W]hat we understand to be the main purpose of the Recess Appointments Clause [is] to enable the President to fill vacancies to assure the proper functioning of our government . . .”); *Woodley*, 751 F.2d at 1013 (explaining the “apparent purpose of recess clause ‘was to assure the President the capacity for filling vacancies at any time to keep the Government running smoothly’” (quoting Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 STAN. L. REV. 124, 126 (1957))); *United States v. Allocco*, 305 F.2d 704, 710 (2d Cir. 1962) (“That purpose, the appellee urges, is to ‘prevent prolonged vacancies in offices whose functions [are] necessary to the efficient and continued work of the government.’” (alteration in original)); Hartnett, *supra* note 15, at 401 (emphasizing that Attorney General Wirt’s analysis “focused on the purpose of the Recess Appointment Clause”).

149. See, e.g., *Evans*, 387 F.3d at 1222–23 (“We focus mainly on what the Constitution says and does not say. The text of the United States Constitution authorizes recess appointments of judges to Article III courts. . . . History unites with our reading to support our conclusion.”); *Woodley*, 751 F.2d at 1010 (“Woodley also argues that there is no historical evidence that the Framers intended the recess provision to apply to the judiciary. This argument is not only refuted by the express language of the recess clause, which, as previously noted, refers to *all* vacancies, but it is also refuted by legislative history, as well as historical practice, consensus, and acquiescence.”); Hartnett, *supra* note 15, at 428 (noting that “every President from James Polk through Lyndon Johnson [made recess appointments to Article III courts], including such diverse presidents as Buchanan and Lincoln”); Rappaport, *supra* note 26, at 1487, 1506–38 (discussing the purpose, structure, and history of the Clause, but only in terms of whether the “original meaning” of the Clause intended for it to apply to intrasession vacancies and vacancies that arose pre-recess).

150. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 385–86 (2006) (Thomas, J., dissenting) (“[T]he practice of the early Congresses can provide valuable insight into the Framers’ understanding of the Constitution.”).

151. See *supra* notes 142–48 and accompanying text.

one of ascertaining intent to applying that intent. With the purposes behind the Clause already articulated, arguments based on George Washington and John Adams's use of the Clause ignore the more salient issue: is the Clause being applied today in a way that furthers its defined purposes?

Against the Framers' concern for the timely filling of vacancies, the independence of the federal judiciary should be considered. Alexander Hamilton argued that the federal judiciary would remain the "least dangerous" branch to constitutional liberties, but only "so long as the judiciary remains truly distinct from both the legislature and executive."¹⁵² The Framers considered it of utmost importance to insulate the federal judiciary from the influence of the other branches.¹⁵³ In order to do so, the Framers granted lifetime tenure and salary to members of the federal bench.¹⁵⁴ They sought to prevent the president from having dominance over the appointment process by mandating that federal judges were to be appointed "by and with the Advice and Consent of the Senate."¹⁵⁵ Thus, the Recess Appointments Clause was intended to function as a limited exception to the general requirement for advice and consent, reserved for those offices that "might be necessary for the public service to fill without delay."¹⁵⁶ This alternative to the typical appointment process could unduly influence recess appointments because it gives the president complete discretion in appointing members to the federal judiciary and may plant concern in the heads of recess appointees for how decisions made during interim appointments might affect their chances at a subsequent lifetime appointment.¹⁵⁷ While these downsides are legitimate, the Framers had to weigh them against what was then a real and present danger:

152. THE FEDERALIST NO. 78 (Hamilton), *supra* note 9, at 522–23; *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 (1982) (plurality opinion) (noting that by "assigning the judicial power of the United States to courts [Article III] insulated [the judiciary] from Legislative or Executive interference").

153. Alexander Hamilton emphasized the importance of an independent judiciary by saying, "from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office." THE FEDERALIST NO. 78 (Hamilton), *supra* note 9, at 523; *see also* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

154. U.S. CONST. art. III, § 1 ("Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.").

155. U.S. CONST. art. II, § 2, cl. 2.

156. THE FEDERALIST NO. 67 (Hamilton), *supra* note 9, at 455.

157. Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 STAN. L. REV. 124, 140 (1957) [hereinafter *SCOTUS Recess Appointments*] (explaining that at the time of Chief Justice Warren's recess appointment, one commentator "feared the effect, in terms of judicial independence, of a Justice sitting on the Court 'with one eye over his shoulder on Congress'"). For a discussion of Supreme Court nominees who were not confirmed by the Senate, including recess appointees such as John Rutledge and Roger B. Taney, *see* Henry B. Hogue, *Supreme Court Nominations Not Confirmed, 1789–2001*, in THE SUPREME COURT AND THE FEDERAL JUDICIARY, *supra* note 6, at 1.

the breakdown of the federal court system stemming from the loss of a single judge. With regard to the contemporary judiciary, that danger has been eliminated, and thus a new examination of the Recess Appointments Clause is warranted. Such an examination should view the Clause in light of its underlying purpose.

Instead of blindly relying on historical practices without considering the reasoning that influenced those practices, a more pragmatic approach should be utilized when examining the Recess Appointments Clause. A "living Constitution" approach accomplishes that goal by interpreting the Constitution in light of the current environment and needs.¹⁵⁸ Under such an approach, the text is "informed by considerations of structure and purpose. As a result, the same words mean something different in the different settings."¹⁵⁹ This view takes into account the Constitution's ability to adapt to changing circumstances, rather than allowing "outworn interpretations to strangle the nation's growth."¹⁶⁰ Today, a vacancy in a federal court does not yield the drastic ramifications that were of undeniable concern to the Framers. No longer are whole districts delegated to just one judge, nor do judges need to juggle responsibilities between their own court and their duties on circuit courts.¹⁶¹ Instead, a complex federal judiciary has been created with distinct responsibilities.¹⁶² Even when a court is overwhelmed with cases, devices not available early in our nation's history have come to play an important role in managing the federal judiciary. Senior judges, transfers, and technology have made the loss of a judge a far less tragic matter.¹⁶³

It is in this context that the purposes behind the Constitution should be analyzed. To do justice to the Constitution is to interpret it in light of its purpose and aims.¹⁶⁴ Those purposes are no longer met by the present application of the Recess Appointments Clause to vacancies in the federal judiciary. In fact, as the next section indicates, recent events have made it

158. The living Constitution approach has come under criticism, most notably from Justice Antonin Scalia. He contends that "[t]he Constitution is not an organism . . . it is a legal document." Tom Kertscher, *Justice Draws Overflow Crowd, Protestors at Marquette*, MILWAUKEE J. SENTINEL, Mar. 4, 2001, at B1. However, the living Constitution approach has in the past found support among other members of the Court. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 307 (1980) (Powell, J. dissenting) ("We are construing a living Constitution."). The application of this approach to the Recess Appointments Clause has recently been advocated by Professor Michael Herz. Herz, *supra* note 4, at 453.

159. Herz, *supra* note 4, at 453.

160. Reich, *supra* note 45, at 749.

161. See *supra* notes 100–05 and accompanying text.

162. See *supra* notes 98–99 and accompanying text.

163. See *supra* notes 110–24 and accompanying text.

164. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) ("[W]e must never forget that it is a *constitution* we are expounding . . . a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.").

clearer than ever that the Clause has become a burden, not a benefit, to the orderly administration of government.

V. THE SENATE'S RESPONSE

A. Growing Tension Between the President and Senate

The scope of the Recess Appointments Clause is still a subject of heated debate.¹⁶⁵ The most recent case dealing with the Clause was the 2004 case of *Evans v. Stephens*.¹⁶⁶ There, the judges of the Eleventh Circuit Court of Appeals upheld the recess appointment of their colleague, Judge William H. Pryor.¹⁶⁷ The Supreme Court denied certiorari, but Justice Stevens engaged in the infrequent practice of drafting a concurrence to the denial of certiorari in which he took pause to note that this case “raises significant constitutional questions regarding the President’s intrasession appointment” of Judge Pryor.¹⁶⁸ He explained that certain facts of this case made it atypical, and thus not warranting review, including the fact that petitioners sought review of an interlocutory order and that the case was confined to a rather infrequent practice: the intrasession appointment of an Article III judge.¹⁶⁹ Nonetheless, Justice Stevens cautioned, “it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits,” leaving open the question of whether certain recess appointments to the federal judiciary are in fact constitutional.¹⁷⁰

The debate about the application of the Recess Appointments Clause to Article III vacancies has been more than academic. Presidents have encountered significant resistance from the Senate in which lawmakers have cautioned that such a practice does not in fact promote the public welfare.¹⁷¹ For the majority of our nation’s history, the presidential process of filling

165. In fact, while the subject was rarely discussed for the first 200 years of our nation’s history, it has undergone a resurgence and heavy scholarly analysis over the past decade. Among these are many law journal articles (including several pieces in a recent symposium by the *Cardozo Law Review*) and congressional reports. See, e.g., FISHER, FEDERAL RECESS JUDGES, *supra* note 30, at 3–4; HENRY B. HOGUE & MAUREEN BEARDEN, CONG. RESEARCH SERV., RECESS APPOINTMENTS MADE BY PRESIDENT GEORGE W. BUSH, JANUARY 20, 2001 – OCTOBER 31, 2008, at 1–17 (2008), available at <http://www.fas.org/sgp/crs/misc/RL33310.pdf>; Symposium, *Jurocracy and Distrust: Reconsidering the Federal Judicial Appointments Process*, 26 CARDOZO L. REV. 331 (2005) (providing eleven articles on the topic of federal judicial appointments).

166. 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005).

167. *Id.* at 1222. President George W. Bush appointed Judge Pryor to the bench on February 20, 2004, while Congress was on an eleven-day recess. *Id.* at 1221; see also Fletcher & Dewar, *supra* note 13; Neil A. Lewis, *Bypassing Senate for Second Time, Bush Seats Judge*, N.Y. TIMES, Feb. 21, 2004, at A1.

168. *Evans v. Stephens*, 544 U.S. 942, 942 (2005).

169. *Id.* at 943.

170. *Id.*

171. E.g., 106 CONG. REC. 12,761 (1960) (statement of Sen. Hart).

vacancies on Article III courts with recess appointees went more or less unchallenged by Congress.¹⁷² In justifying the president's power to make temporary appointments to Article III courts, advocates of such an expansive view of the Recess Appointments Clause point heavily to this "historical acquiescence" by the Senate.¹⁷³ However, as the structure of the federal judiciary changed, recess appointments began to come under scrutiny. In 1960, just a few years after President Eisenhower's recess appointments of Justices Warren, Brennan, and Stewart to the Supreme Court,¹⁷⁴ the Senate passed a resolution requesting that recess appointments to the Supreme Court be avoided "except under most unusual and urgent circumstances."¹⁷⁵ This resolution asserted that such appointments may not be "wholly consistent" with the needs of the citizens of the United States.¹⁷⁶

In the coming decades, recess appointments continued to be a popular source of discussion in the Senate, most often focusing on appointments made during intrasession recesses or those involving federal judges.¹⁷⁷ In fact, during the Reagan administration, Senate Democrats retaliated against the president's use of recess appointments by holding up the confirmation of hundreds of presidential nominees, only relenting once "the White House agreed to give the Senate advance notice of all future recess appointments."¹⁷⁸ Thus, rather than

172. See *United States v. Woodley*, 751 F.2d 1008, 1010–11 (9th Cir. 1985) (en banc) (stating that "[t]he Legislative Branch has consistently confirmed judicial recess appointees without dissent"); Rappaport, *supra* note 26, at 1576 (describing recess appointments as a "long-standing practice"); *SCOTUS Recess Appointments*, *supra* note 157, at 132.

173. See *Woodley*, 751 F.2d at 1011–12; Curtis, *supra* note 6, at 1785–86.

174. FISHER, FEDERAL RECESS JUDGES, *supra* note 30, at 4; Fisher, *Recess Appointments*, *supra* note 6, at 141; Jackson, *supra* note 111, at 975.

175. 106 CONG. REC. 18,145 (1960) (passing the resolution by a vote of forty-eight to thirty-seven, with fifteen senators not voting). During debate of the resolution, Senator Hart argued that recess appointments "should not be made except under unusual circumstances and for the purposes of preventing or ending a demonstrable breakdown in the administration of the Court's business." *Id.* at 18,130. Then in 1985, Senator Proxmire explained that the Senate's concern was "that a sitting Justice was placed in a most difficult position since he or she participated in judicial decisions but without the protections afforded by the lifetime appointment status of the other Justices." 131 CONG. REC. 17,623–24 (1985) (statement of Sen. Proxmire). For a more detailed discussion of the Senate debates, see Hartnett, *supra* note 15, at 433–35.

176. 106 CONG. REC. 12,761.

177. See 150 CONG. REC. 2919 (2004) (statement of Sen. Leahy) ("The President says that he wants judges who will 'follow the law' and complains about what he calls 'judicial activism.' Yet, he has acted—with disregard for the constitutional balance of powers and the Senate's advice and consent authority . . ."); 131 CONG. REC. 22,419 (1985) (Senator Byrd and a number of democratic Senators sponsored a resolution, S. Res. 213, condemning appointments made during short intrasession recesses.).

178. 41 CONGRESSIONAL QUARTERLY ALMANAC: 99th Congress, 1st Session 1985, at 418 (1986); see also Fisher, *Recess Appointments*, *supra* note 6, at 134 ("Confrontations over recess appointments in the 1980s and 1990s led to political agreement between the executive and legislative branches. . . . [Presidents] recognized that excessive use of this power could trigger credible threats from Senators to place a hold on all nominations . . .").

recess appointments promoting the orderly administration of government, their use resulted in a turf war whereby the confirmation process was actually stifled. Despite massive opposition to the liberal use of power granted under the Clause, the executive branch has used the Clause vigorously, often to fill important positions with controversial nominees.¹⁷⁹

B. The Thanksgiving and Christmas “Pro Forma” Sessions

This controversy came to a head during the presidency of George W. Bush. In the span between President Bush’s inauguration in 2001 and June 2007, he made a total of 171 recess appointments, 141 of which were made during intrasession recesses averaging only twenty-five days.¹⁸⁰ Two of these recess appointments were made to Article III courts—both of which were circuit court vacancies that the president used his power to fill in early 2004.¹⁸¹ The recess appointees were Judge Charles W. Pickering, who filled a vacancy on the Fifth Circuit, and Judge William H. Pryor, who went to the Eleventh Circuit.¹⁸² Senate Democrats expressed particular dissatisfaction with these two appointments and reached an agreement with the president on May 18, 2004, wherein they assured floor votes on twenty-five nominees in exchange for the president’s pledge not to make any further recess appointees to the federal judiciary for the remainder of the 108th Congress.¹⁸³ This bargain was limited to federal judicial vacancies, so President Bush continued to use the Recess Appointments Clause to fill vacancies in other offices.¹⁸⁴

Over the next few years, Democrats in Congress continued to express their dissatisfaction with the president’s routine use of intrasession recesses to appoint nominees to influential positions, often by reference to the recess appointments to the federal judiciary by President Bush in 2004. For example, on the Senate floor in 2007, Senator Feingold (D-Wis.) attacked President Bush for “not act[ing] in a bipartisan way.”¹⁸⁵ He referred to the president’s past recess appointment of Judge Pickering as “a further slap to this

179. See 153 CONG. REC. S13,243 (daily ed. Oct. 23, 2007) (statement of Sen. Leahy) (“President Bush had previously used a recess appointment to put Charles Pickering on the bench, after his nomination was voted down by the Judiciary Committee in 2002. President Bush announced that appointment, as I recall, on the Martin Luther King Jr. holiday weekend in 2004 . . .”).

180. HOGUE & BEARDEN, *supra* note 165, at 2–3, 7.

181. FISHER, FEDERAL RECESS JUDGES, *supra* note 30, at 6.

182. Judge Pickering was appointed in January and Judge Pryor in February. *Id.*

183. *Id.*; Helen Dewar, *President, Senate Reach Pact on Judicial Nominations*, WASH. POST, May 19, 2004, at A21.

184. Dewar, *supra* note 183 (noting that roughly seventy non-judicial appointments were tied up for other reasons). In fact, the Senate adjourned for a ten-day recess just three days after reaching its agreement with the president. Twelve recess appointments were made during that recess. HOGUE & BEARDEN, *supra* note 165, at 9 (not distinguishing between judicial and non-judicial appointments).

185. 153 CONG. REC. S13,289 (daily ed. Oct. 24, 2007) (statement of Sen. Feingold).

institution.”¹⁸⁶ Other senators, such as Senator Leahy (D-Vt.) have echoed these remarks, contesting that Judge Pryor’s appointment is indicative of “the very problem with recess appointments of controversial judges.”¹⁸⁷ Although senators made known their distaste for the president’s past use of the Recess Appointments Clause, by the fall of 2007 they were still unable to get the president’s assurance that he would not fill crucial positions with recess appointees.¹⁸⁸ Thus, the Senate took action. With the Thanksgiving Recess approaching, the Senate Democrats feared that the president would see this short break as an opportunity to use his recess appointment power to circumvent the Senate’s advice and consent role.¹⁸⁹ Senate Majority Leader Harry Reid (D-Nev.) “asked a few Democratic senators who plan[ned] to be close to the capital during the holidays . . . to gavel open and shut the Senate for two days each week.”¹⁹⁰ This resulted in a series of “pro forma” sessions lasting only a minute or two, held during the Thanksgiving Recess.¹⁹¹ By employing this formalism, the Senate was still technically “in session,” thus eliminating the president’s recess appointment power.¹⁹² Amid more debates over nominees, the Senate again employed pro forma sessions over the Christmas Winter Break.¹⁹³

Both series of pro forma sessions largely related to controversial executive appointments,¹⁹⁴ but speak generally to the problems underlying the expansive construction given to the Recess Appointments Clause. No longer is there broad congressional acquiescence. In fact, Congress has made its distaste for Article III recess appointments expressly known. When these events are

186. *Id.*

187. 151 CONG. REC. S6282 (daily ed. June 9, 2005) (statement of Sen. Leahy).

188. See Levey, *supra* note 47.

189. Specifically, they heard “rumors that Bush might use the recess to appoint Dr. James W. Holsinger Jr. as U.S. surgeon general.” *Id.*

190. *Id.*

191. 153 CONG. REC. S14,609 (daily ed. Nov. 16, 2007) (statement of Sen. Reid) (“Mr. President, the Senate will be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments.”).

192. Levey, *supra* note 47; Zay N. Smith, *Stand and Deliver*, CHI. SUN-TIMES, Jan. 2, 2008, at 24.

193. Paul Kane, *The Fastest Gavel in the Senate*, WASH. POST, Dec. 31, 2007, at A13; Smith, *supra* note 192; Robert J. Spitzer, Op-Ed., *The ‘Pocket Veto’ Peril*, L.A. TIMES, Jan. 8, 2008, at A19; Editorial, *Nominee is a Stranger to Justice*, ST. PETERSBURG TIMES (Fla.), Feb. 5, 2008, http://www.sptimes.com/2008/02/05/Opinion/Nominee_is_stranger_t.shtml.

194. The Thanksgiving sessions stemmed largely from the fear of the recess appointment of a new surgeon general. Gail Russell Chaddock, *Democrats Take Defensive Tack with Bush*, CHRISTIAN SCI. MONITOR, Nov. 21, 2007, at 2; Alicia Mundy, *Wary Democrats Keep a Light on at Capitol*, SEATTLE TIMES, Nov. 24, 2007, at B3; John Bresnahan, *Reid to Bush: No Recess Appointments Wanted*, POLITICO, Nov. 16, 2007, <http://www.cbsnews.com/stories/2007/11/16/politics/politico/thecrypt/main3516002.shtml>. The winter sessions centered on concerns about President Bush appointing a new assistant attorney general. See Bruce Alpert & Bill Walsh, *On the Hill: Landrieu Calls 40-second Session*, TIMES-PICAYUNE (New Orleans), Jan. 6, 2008, at A25.

viewed in conjunction with the structure of the contemporary judiciary, it is clear that recess appointments to Article III judgeships are no longer necessary to serve the public interest. With the purpose behind the Clause no longer met, it should not apply to Article III judgeships. Therefore, the Recess Appointments Clause should essentially be read out of the Constitution when examining Article III vacancies. To fulfill the Framers' intent, the emphasis should instead move to the Constitution's explicit command that federal judges should be appointed for lifetime tenure, by and with the advice and consent of the Senate. Such a construction furthers the Framers' goals by providing a judiciary that functions effectively, whose members have undergone congressional scrutiny, and that is insulated from political influence.

VI. CONCLUSION

The recent wars between the president and Senate over the recess appointment power epitomize the changes between the Framers' intent in drafting the Recess Appointments Clause and its application today. The Framers envisioned the Recess Appointments Clause as a way of ensuring the orderly administration of government and serving the public good. Instead, it has yielded the opposite result, particularly with respect to the federal judiciary. It has resulted in Senate resolutions, congressional outrage, and turf wars among presidents and Congresses. Congressional retaliation has taken more than one form, including delays in the confirmation procedure, harsh words about the president's ethics, and the employment of formalistic faux-congressional sessions. These results are particularly unsettling when examining the federal judiciary. The Recess Appointments Clause no longer serves a necessary function because of the judiciary's internal mechanisms for coping with judicial vacancies. Senior judges and transfers can be utilized to fill voids in the judiciary, rather than relying on the president's unilateral appointment of untenured judges. When considered in light of the Constitution's express interest in permanent, independent judges,¹⁹⁵ it is clear that the Recess Appointments Clause has outlived its usefulness as applied to the federal judiciary. Instead, the interests underlying the Advice and Consent Clause should be considered paramount. By construing the Constitution as a living document that can mean different things in different contexts, a reading more in line with the Framers' intent could be adopted. With its purpose no longer served, future presidents should not be permitted to use this power to fill vacancies on Article III courts. This does not cast doubt on the recess appointments by prior presidents, but rather recognizes that different times necessitate different readings of the Constitution's broad grants of power.

195. See U.S. CONST. art. II, § 2, cl. 2; see also THE FEDERALIST NO. 78 (Hamilton), *supra* note 9, at 523–24.

